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Supreme Court of the United States

OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

against

VALENTIN ENCARNACION.

PETITIONERS' BRIEF.

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VALENTIN ENCARNACION.

PETITIONERS' BRIEF.

Statement.

On Certiorari to Review a Judgment of the Supreme Court of New York, Entered on the Remittitur of the Court of Appeals Which Directed the Reinstatement of the Judgment in Favor of the Plaintiff at the Trial Term, Reversing a Judgment and Order of the Appellate Division of the Supreme Court for the Second Judicial Department Which Had Reversed the Judgment in Favor of the Plaintiff and Dismissed the Complaint.

The action was brought in the New York Supreme Court, Kings County, to recover damages for an assault committed by a gang foreman upon a stevedore working in his gang (5-6).

Upon the trial, the plaintiff had a verdict of $2,500. (31-33) upon which judgment was entered (12).

The Appellate Division of the Supreme Court, in the Second Judicial Department, reversed the judgment and

dismissed the complaint (58, 59), upon the ground that the assault was that of a fellow servant for which the master was not responsible (63).

The Court of Appeals reversed the Appellate Division, and reinstated the verdict, (199-206) on the ground that Merchant Marine Act of June 5th, 1920, Title 46, Section 688, known as the Jones Act, applied and that by that Act, the master became responsible for the "misconduct" of a foreman, although no negligence was proved (76, 81).

On the remittitur of the Court of Appeals judgment was entered for the plaintiff for $2,638.05 (219, 220).

This Court granted a Writ of Certiorari, to review this judgment entered on the remittitur of the Court of Appeals of the State of New York (83).

Pending the appeal to the Court of Appeals, William A. Jamison, the only defendant served in the action, died and the petitioners were substituted as his executrix and executors (65, 66).

Facts.

The Assault.

The assault is testified to by the injured man as follows (15):

> "Q. What kind of work were you doing? A. Stevedore.
>
> Q. What kind of stevedoring work were you doing? A. Everything.
>
> Q. Were you loading or unloading barges? A. Loading barges.
>
> By the Court:
>
> Q. What did he say? A. He called me and said, 'Hurry up, you black bastard son-of-a-bich.'
>
> By Mr. Castellano:
>
> Q. And what did you say to him? A. I said, 'Leave me alone today. I am here for four or

five years and I can do the work and I know what work to do.'

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor."

The Work.

The gang of whom the plaintiff was one, was loading a barge which lay in the East River at the foot of Jay Street, Brooklyn (14) at the defendant's place of business; the plaintiff testified (42).

"Q. On May 19, 1925, were you working on barge No. 3? A. Yes.

Q. And was that barge in the river? A. Yes, sir.

Q. At the foot of Jay Street, Brooklyn? A. Yes."

There is no evidence that the barge had any crew, or was being used in loading any vessel, which employed seamen.

POINT I.

The Federal Employers' Liability Act of April 22, 1908, (35 Stat. Ch. 149; Sec. 1, Mason's United States Code), Title 45, Section 51, made applicable to seamen, by Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250: Section 53, Mason's United States Code) Title 46, Section 688, known as the Jones Law does not extend the employers' liability to a willful assault of a workman by his foreman in the absence of negligence.

Mr. Justice Kapper writing for a unanimous Court in the Appellate Division in the Second Judicial Department reversing the judgment and dismissing the complaint said (60-63):

> "It is urged first that stevedores, like seamen, are now entitled to the benefits to be derived from jurisdiction of common law courts in cases involving maritime torts, and this is so (International Stevedoring Co. *v.* Haverty, 272 U. S. 50). It is then claimed that the ruling in Gabrielson *v.* Waydell (Supra) has been made obsolete by the Act of Congress (referred to generally as the Jones Act), being Section 20 of the Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920. This Act of Congress extended to seamen the common law right or remedy given in cases of personal injury to railway employees (Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 389). And because the Railway Employers' Liability Act declares an employer liable for injury resulting in whole or in part 'from the negligence of any of the officers, agents, or employees' of such railroad company (Act of April 22, 1908, being entitled 'An Act Relating to the liability of common carriers by railroad to their employees in certain cases') and thereby abolished the common law fellow-servant rule, it is contended that the assault committed by this gang boss must be regarded as the act of a

> fellow-servant for which the master is liable within the principles now declared in cases of maritime tort. There is no analogy between the real case and the invoked rules. The Railway Employers' Act (supra) is explicit in predicating liability upon 'negligence'. No term or phrase other than 'negligence' as a basis of liability is mentioned in the legislation. Certainly 'assault' is nowhere mentioned or referred to. The entire theory of the Act is that of negligence as the term has been understood from time immemorial, emphasized by provisions for a diminution of damages recovered when there is found to be 'negligence attributable to such employee', or he has 'been guilty of contributory negligence'. It is these provisions only which were extended to the 'Jones Act' (supra), with the result in my opinion, that the case of Gabrielson *v.* Waydell (supra), is still alive in so far as concerns a recovery of full indemnity for injury, as at common law".

The Federal Employers' Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1), in clear unequivocal terms makes "negligence" the basis of liability under that act. It provides in part that every common carrier by railroad . . .

> "shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

In 1920, the Jones Act extended the provisions of the Federal Employers' Liability Act to seamen. The Jones Law, Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250, Section 53) provides that:

> "Any seaman who shall suffer personal injuries in the course of his employment may at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States *modifying or extending the*

common law right or remedy in cases of personal injury to railroad employees shall apply." (Italics is ours).

The Court of Appeals has added a cause of action due to misconduct to the Federal Employers' Liability Act.

The Court of Appeals of the State of New York reinstated the verdict for the plaintiff, and held:

FIRST:—That the plaintiff had no action at common law.

SECOND:—That the facts brought the plaintiff under the amendment of the Jones Law, although no negligence was established, that the Federal Employers' Liability Act created liability for the mere misconduct of a co-employee in the course of the work.

In passing on the first question, the Court of Appeals said (231-233):

> "The learned counsel for the appellant with admirable candor concedes that no fault can be found with the court below for adhering to the rule as thus stated, but he asks this court to change the law 'to establish a better rule of conduct and give place to a higher degree of justice.' Long and firmly established doctrines are not so easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the court to the actualities of industrial and business life (*Fitzwater* v. *Warren*, 206 N. Y. 355; *Klein* v. *Maravelas*, 219 N. Y. 383). The *Gabrielson* case was decided by a divided court with a strong dissent. It has been subjected to much adverse criticism. While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seaman under him is a risk assumed by the seaman for the consequences of which the owners are not responsible (*Gabrielson* v. *Waydell*, 67

Fed. Rep. 342; *The Osceola*, 189 U. S. 158, 175), there remains in it a vestigial remnant of the once all-comprehensive fellow-servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this court if it remains in harmony with recent legislation on the subject."

In holding that the plaintiff made out a case under the Federal Employers' Act, the Court of Appeals said (233-241):—

"The admiralty and maritime law is subject to change by Congress. Congress has acted and the Supreme Court of the United States has said broadly (*International Stevedoring Co.* v. *Haverty, supra*) that 'the statutes do away with the fellow-servant rule' as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes necessary to examine the course of legislation on the subject to determine its bearing on our decisions.

The fellow-servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seamen's Act of March 4, 1915 (38 Stat. ch. 153, Sec. 20), it was provided that 'in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under authority.' This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited liability in the case of seamen (*Chelentis* v. *Luckenbach, S. S. Co.*, 247 U. S. 372), and was probably appropriate only to the relief of seamen

in any event. (*Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300). It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. ch. 250, Sec. 53; 3 Mason's U. S. Code, tit. 46, ch. 18, Sec. 688, p. 3273), which extends to seamen who shall suffer personal injury in the course of their employment, the rights and remedies given by Congress to Railroad employees (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 389; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 324; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130) by providing that they may maintain actions against their employers for damages and that in such actions 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply' to them. The reference is to the Federal Employers' Act of April 22, 1908, (35 Stat. ch. 149, Sec. 1; 3 Mason's U. S. Code, tit. 45 ch. 2, Sec. 51, p. 3064) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, ch. 121, L. 1921, which applies the vice-principle rule only to cases of negligence). Nevertheless, Mr. Justice Holmes, writing for the United States Supreme Court in the *Haverty Case* (supra) reads the act as doing away with the fellow-servant rule as freely as he reads the word 'seaman' so as to include 'stevedores'. This, it would seem, is its popular interpretation. As the word 'seaman' in the act includes 'stevedores', so the word 'negligence' should 'in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century', include 'misconduct'. Reading *Gabrielson* v. *Waydell* (supra) in the light of the Merchant Marine

> Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly that Congress, in doing away with the fellow-servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (*Mott v. Consumers Ice Co.*, supra)."

When the Court of Appeals says:

> "we should not waste time in pointing out distinctions between negligence and misconduct • • • in order to defeat plaintiff's recovery",

we submit it overlooks the fact that it is not a question of "defeating" a cause of action, but of creating a cause of action. That whether a cause of action has been created depends upon the clear and unambiguous language of a Federal Statute, the mere reading of which leads to the irresistible conclusion that no recovery under the Statute is intended except in cases of "negligence", and this Court has so repeatedly held.

It seems to us that the Federal Act does not modify the Common Law, but instead, adopts in a modified form the comparative new and progressive principle of industrial insurance wholly alien to common law. The common law principles applicable to Master and Servant *pro-*

tect the servant *against injury* by imposing certain duties upon the master *in the doing of the work.*

Industrial insurance ignores the manner of doing the work, it creates no duties in regard thereto, and affords no protection against injury but concerns itself with the *injury,* on the theory that the industry should bear the burden of compensating all workmen injured in accidents arising out of and in the course of the work.

In passing the Federal Employers' Liability Act, Congress knew that a large number of employees were injured by the negligence of co-employees, for which the common law provided no remedy, and that many were injured as a result of the risks of the work, and not because of any negligence, which likewise were irremediable at common law. It chose to legislate entirely with the first class of injurie namely, those due to the negligence of fellow servants. It adopted in a modified form the principle of industrial insurance by making the common carrier an insurer against loss from injuries due to the negligence of a fellow servant.

If the principle of industrial insurance was ingrafted by the Courts into the Common Law, it would have to be applied to all cases arising between master and servant.

So far legislation recognizing the principle of industrial insurance has not attempted to apply it to all employers of labor, but has exempted certain classes and has classified "hazardous employments" and made the industry, not the individual employer, bear the burden of compensation by providing a fund derived in the main from premiums from all engaged in the industry. Or, as in the Federal Employees Liability Act has made it applicable to one industry, that of common carriers. In this instance, there is no specific fund provided but as the Act only applies to Common Carriers by rail or employers of

seamen, both of which require large capital, the burden is easily adjusted by each carrier. If, however, this principle was recognized by Common Law courts, it would have to be inforced against the small business as well as the large business enterprises. An accident due to no negligence of any kind or to the negligence of a fellow servant if compensated for in a common law action by imposing the principle of industrial insurance by making the employer an insurer against injuries would wipe out a small business enterprise.

The Common Law Courts could not create a fund for the payment of judgments, or compel a judgment in a common law action to be satisfied by other means than execution against the property of the judgment debtor. If the common law courts attempted to apply the principle of industrial insurance in master and servant cases, it would endanger all small business enterprises as each master would be responsible for the entire loss resulting from the obligation of insuring employees against loss from injuries due to accidents arising out of and in the course of the employment.

We submit that the Courts in applying common law rules of master and servant should not be influenced by Statutes either State or Federal which recognize the economic principle of industrial insurance.

The change from liability for negligence according to common law rules to that of insurance against loss for injuries should be left entirely to the legislative branch of government and the Common Law Courts should not extend a statute, beyond its terms, merely because, in their opinion, the legislative body may have intended to so provide but failed to express such intention nor we submit should the common law attempt to induct either the principle or spirit of industrial insurance into common law actions.

Turning again to the wording of the Federal Employers' Liability Act, it is impossible to find any language suggesting liability for "misconduct". If "misconduct" can be read into the Statute, any other word extending the master's liability for the conduct of fellow employees can equally well be read into the Act, libel, slander, malicious prosecution, false arrest or conduct not even tortious and there is no limitation to the addition of such new rights, if the Court of Appeals opening up of this remarkable method of interpreting this Statute is sustained.

Your petitioners' counsel confidently assert that all decisions of all other State and Federal Courts including several in this Court unanimously hold that liability under the Federal Employers' Liability Act depends upon proof of negligence.

In

Chesapeake & Ohio R.R. Co. v. *Stapleton*, 279 U. S. 587,

an injured workman obtained a verdict in a personal injury action. On the trial he proved no negligent act or omission, but relied solely on the fact that he was employed in violation of a State Statute which the State Court had held was negligence as a matter of law. In reversing the judgment, this court said:

> "The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovering is negligence. That without such negligence no cause of action is given under this Act."

The Federal Employers' Liability Act creates a new obligation in the event of negligence and the courts cannot extend such obligation to cover misconduct.

In

Barnet vs. *National Bank*, 98 U. S. 555, 558,

this court said:

> "When a Statute creates a new right or offense and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive, Farmers & Mechanics Nat'l. Bank *v.* Dearing, 91 U. S. 29."

In

Shaw vs. *Railroad Co.*, 101 U. S. 557, 561,

this court said:

> "No statute is to be construed as altering the common law further than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express."

The Federal Employers' Liability Act "Unmistakably" bases the employers' liability on negligence, and no words can be read into it by implication to extend it beyond its express meaning.

In

Marvil v. *Merritt Collection*, 116 U. S. 11,

this court said:

> "The words used are not technical either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning. They are words of common speech.

In

United States v. *B. & O. Southwestern R.R.*, 222 U. S. 8, 13,

this court said:

> "If however there is no ambiguity, the words of the Statute are the measure of its meaning."

See also,

American Express Co. v. *United States,* 212 U. S. 522, 534, 535.
Dewey v. *United States,* 178 U. S. 510, 520.
United States v. *Chase,* 135 U. S. 255, 261.

In

Kepner v. *United States.* 195 U. S. 100, 125,

this court said:

> "It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."
> "And again in ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken, 1 Kent. Com. 336, U. S. *v.* Wong Kin, Ark. 169 U. S. 640."

In

Yerkes v. *United States,* 173 U. S. 439, 442,

this court said:

> "The act of 1891 is not ambiguous, its clearness does not need and may not be construed by analogies from other statutes."

See also

Lake Country v. *Rolkus,* 130 U. S. 662.

The courts may not read additional words into an unambiguous statute on the theory that Congress must have intended to make the statute cover the added subject.

In

Dewey vs. *United States,* 178 U. S. 510, 520, 521,

this court said:

"Of course our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject. There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement, it is not unreasonable that all the difficulties of every kind, with which they were confronted, while engaging the enemy should be taken into consideration. But that is a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to suppose that it proceeded upon the broad basis suggested when it is expressly declared that the amount of its bounty shall depend upon the question whether 'the enemy Vessel'—not the enemy's vessel and the land, batteries, mines and Torpedoes, by which it was supported—was inferior or of equal or superior force."

And again

"This court has nothing to do with questions of mere policy that may be supposed to underlie this action of Congress. What is termed the policy of the government in reference to any particular subject of legislation this court has said 'is generally a very uncertain thing upon which all sorts of opinions each variant from the other, may be formed by different persons'. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of Statutes. Hadden *v.* The Collector, 5 Wall. 107, 111. Our province is to declare what the law is, and not under the guise of interpretation or under the influence of what may be surmised to be the policy of the government so to depart from sound rules of construction as in effect to adjudge that to be

> the law, which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the Statute involves no absurdity or contradiction and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed. United States *v.* Fisher, 2 Cranch, 358, 399, Lake County *v.* Rollins, 130 U. S. 662, 670."

In

United States vs. *Chase,* 135 U. S. 255, at p. 261,

referring to the Lewd publications statute, Section 1 of the Act of July 12, 1876, this court said:

> "Another argument on which indictments of this character have been sustained by some of the Circuit Courts is that a reasonable construction must be given the Statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial, whether the thing prohibited is inside or outside an envelope, and therefore, unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as important and in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the Statute; or implied from a fair interpretation of its context. Even though they may involve the same mischief the statute was designed to suppress."

Citing

United States v. *Sheldon*, 2 Wheat 119.
United States v. *Wiltberger*, 5 Wheat, 76, 95.
United States v. *Morris*, 14 Peters 464, 475.
United States v. *Hartwill*, 6 Wall, 385.
United States v. *Reese*, 92 U. S. 214.

In

United States v. *Goldberg*, 168 U. S. 95, 103, this court said:

> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the Statute."

In

Newhill v. *Sanger*, 92 U. S. 761, 765,

construing Section 6, Act of March 3rd, 1853, introducing the land system into California (10 Stat. 246), this court said:—

> "This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed but there is no authority to import a word into a statute in order to change its meaning."

The re-enactment of a statute, by amendment or otherwise, constitutes a ratification of prior judicial construction and in the absence of obvious error, is regarded as read into the re-enactment.

When Congress by amendment of the Jones Law extended the rights under the Federal Employers' Liability Act to seamen, it thereby ratified the construction of the courts, that the cause of action created was founded solely on negligence.

In

New Haven R. R. vs. *Industrial Com. Com.*, 200 U. S. 361, 401, 402,

this court indicated that the decisions of the Commission which had construed the statute, might not be in accord with the view of the United States Supreme Court if the question was an original one in that court. But it followed the prior interpretation and said:

> "We concede that the interpretation given by the Commission in these cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute which construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The above decision was approved in

Copper Queen Mining Co. v. *Arizona Board*, 206 U. S. 474, 479,

although this court held that it was not applicable to the facts in the Copper Queen case. The court said:

> "When for a considerable time a statute notoriously has received a construction in practice, from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature unless plainly erroneous, since otherwise naturally the words would have been changed."

Prior to 1920, when the Jones Act extended the application of the Federal Employers Liability Act to seamen, the United States Supreme Court had distinctly held that the Federal Employers Liability Act only extended the Employers Liability where negligence was established.

This amendment of the Jones Act was a re-enactment of the Federal Employers' Liability Act and by so doing, Congress ratified and approved the many decisions limiting the masters liability thereby created to the precise language of the Act, i. e., where the action was founded on negligence.

The following cases were decided under the Federal Employers' Liability Act before the Jones Act of 1920 extended it to seamen.

In

Seaboard Air Line v. *Horton*, 233 U. S. 492, decided in 1913,

The United States Supreme Court held:

> "it was the intention of Congress to base the actions upon negligence only and to exclude responsibility of the carrier to its employee for defects and insufficiencies not attributable to negligence."
>
> "To hold that under the Statute the Railroad Company is liable for injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused is to take from the Act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence."

In

Southern Railway vs. *Gray*, 241 U. S. 333, 339, decided in 1916,

this court said in regard to the Federal Employers' Liability Act, reversing a judgment entered upon a verdict for the plaintiff:

> "Negligence by the railway company is essential to a recovery."

Negligence of the employer or of its officers, agents or employees is essential to a recovery.

When Congress in 1920 extended to seamen the right of action under the Federal Employers' Liability Act, it knew that the State and Federal Courts had consistently held for twelve years that this act only fastened liability on the employer for negligence.

The act itself is clear and unambiguous and bases liability solely on negligence. The decisions of the State and Federal Courts had clearly and without exception limited liability to cases of negligence.

If Congress had desired to give railroad employees or seamen or both a cause of action, for assault or any "misconduct" not amounting to negligence, it would have done so by the use of some appropriate language expressing such purpose, either in the Jones Act, or by amending the Federal Employers' Liability Act.

The decision of this court in International Stevedoring Co. v. Haverty, 272 U. S. 50, relied upon by the Court of Appeals as a controlling authority in this court in favor of the cause of action in the suit at bar does not sustain the Court of Appeals' ruling.

In the *Haverty* case, this court held that a stevedore, in loading or unloading a vessel plying in navigable waters, was performing a seaman's work and was therefore classed as a "seaman". This conclusion is founded on a historic review of seamen's duties, which establish that in former times, seamen performed the work of loading and unloading their vessels, from which fact, this court considered that the segregation of this duty to stevedores did not remove it from the category of seamen's work, and therefore, reached the conclusion that the men performing seamen's work were to be classed as seamen.

Following the same process of reasoning, in the instant case, discloses the error in the Court of Appeals' application of the Haverty decision to this case.

The word "assault" is of ancient and definite meaning. The word "negligent" is of less ancient, but no less definite meaning.

An "Assault" signifies a wilful or wanton trespass upon the body of another.

Negligence is the failure to exercise ordinary care whereby another is injured in his person or property.

Since common law times "Assault" has meant one thing and "negligence" has meant an entirely different thing.

The act of a stevedore, in loading or unloading a vessel was the same as the act of a sailor doing the same work and so he has been classed as a seaman in the doing of that work. But the act of committing an assault and the act or inaction constituting negligence, have never at common law been regarded as the same thing, but totally different things.

This court in the *Haverty* case applied the rule that

> "things equal to the same thing are equal to each other."

This court in classifying a stevedore performing seaman's work as a seaman, added nothing to the Statute. But the Court of Appeals has added to the Statute by inserting the word

> "misconduct",

If the Court of Appeals' decision stands the statute now reads:

> "Every common carrier * * * shall be liable in damages * * * for such injuries * * * resulting * * * from negligence (or misconduct.)"

so that by judicial extension of the Federal Employers' Liability Act a new liability is placed upon common carriers and the employer of seamen based on the misconduct of a co-employee.

That liability does not depend upon any classification, but solely upon judicial *ipse dixit* that Congress must have meant to create a right not mentioned in the act and therefore, the Court of Appeals has added it to the Statute.

Gabrielson v. Waydell, 67 Fed. Rep. 342, distinguished.

The Court of Appeals cites *Gabrielson* v. *Waydell*, 67 Fed. Rep. 342.

After the Court of Appeals had held that Gabrielson had no common law cause of action in negligence he brought suit in the Federal Court and there obtained a judgment. It should be noted that the Federal Court did not pass on any question of negligence, but based the recovery on Admiralty rules which require the owner to provide among other things a "seaworthy" vessel. The Court held that an incident of a "seaworthy" vessel, was to have it competently manned, and that the captain who assaulted Gabrielson was shown to be incompetent by reason of his brutal conduct.

This decision, in no way, indicates a ruling contrary to that of the Court of Appeals in the Gabrielson case.

It is not out of place to say that the prevailing opinion in the Gabrielson case in the Court of Appeals, is far less convincing than the dissenting opinion, which urges that the well established authority of the master of a vessel to use physical force in disciplining his crew, made the owner liable for a mis-use of this authority. It seems to counsel that, this authority to use force, should have subjected the defendant Waydell to liability.

However, although a longshoreman, while engaged in loading or unloading a vessel, is a seaman under the Hav-

erty decision, the employing stevedore and his foreman have not been vested with the authority of a master of a ship.

They have no express or implied authority to use force to keep longshoremen at work. So that in the case at bar, the respondent's case is not strengthened, even though the Court of Appeals' decision in the *Gabrielson* case should be overruled.

POINT II.

There is no evidence that the barge the longshoremen were loading was being used in connection with the loading or unloading of any vessel employing seamen, therefore, the defendant in error is not shown to have been engaged in seamen's work, and is not entitled to the benefits of the Federal Employers' Liability Act.

There is no historic background from which to infer that seamen are or even were employed on harbor barges towed around the harbor.

The merchandise was loaded and unloaded by longshoremen, used solely for that purpose. It does not appear, nor we submit can any inference be drawn, that this barge had any captain or crew.

The historical review which disclosed that longshoremen or those loading or unloading a vessel, were doing the work that sailors formerly did, finds no parallel in this case. The injured man was engaged in loading a barge which had no seamen or sailors upon it, and it does not appear that such barges ever carried seamen.

He was, doing mere longshoreman's work, unconnected with any vessel, employing seamen. Therefore, he is not entitled to the benefits of the Federal Employers' Liability Act, as made applicable to seamen.

POINT III.

The fact that the tort was committed on navigable water, and therefore is subject to the federal jurisdiction over maritime matters, does not make the Jones Act applicable.

The Court of Appeals said (229):

> "The cause of action having arisen upon the navigable waters of the United States, is to be disposed of under the principles of maritime law. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142; 49 Sup. Ct. Rep. 88; *Resigno* v. *Jarka Co. Inc.*, 248 N. Y. 225."

In determining that the maritime law applies, it is only necessary that the transaction arose on navigable water. In other words, it is a mere question of Federal jurisdiction.

But whether the plaintiff comes within the Jones Act depends upon the further fact, namely, was the injured man a "seaman".

A stevedore merely as such, is not a seaman. It is only when he is performing seaman's work that he is so classified.

In the decisions of this Court classifying a stevedore as a seaman, it has appeared:

> 1st:—That the action was founded on negligence.
>
> 2nd:—That the stevedore was performing a seaman's work, that is, loading or unloading a vessel which plied in navigable water, and in charge of seamen.

In the instant case, these two essential facts are missing.

There is no claim of negligence.

There is no proof that this barge was operated by seamen.

The barge was evidently to go to the Southern Pacific Co. (91-92). Louis Osborne testified (91-92):

> "Q. You saw the occurrence between Valentin and Curren? A. I was present at the time it happened.
>
> Q. At that time, where were you employed? A. I was a checker for the Southern Pacific Company at that time.
>
> Q. Have you ever been employed by Arbuckle Brothers? A. No.
>
> Q. Have you ever had any connection with them or any of their offices? A. No connection whatsoever.
>
> Q. Where were you at the time of this fracas? A. I was in charge of checking freight, that was loaded on the barge at that time."

The business of the Southern Pacific Company is a common carrier by rail and water (*Southern Pacific Co.* vs. *Jensen*, 244 U. S. 205).

In the case at bar, the Jones Act is invoked to make the master the employing stevedore, responsible for a willful assault by a foreman of a workman under him.

The Court of Appeals recognizes that at common law the master is not so responsible, but decides that because the plaintiff was a "Seaman" the master is made liable under the Jones Act.

In so doing, the Court of Appeals overlooks the fact that the decision of this Court merely decide that in actions based on negligence, the Jones Act classifies stevedores doing seamen's work, as seamen.

This court has never held that an employer stevedore, because he is loading a vessel, is the master of the ship. The employer of the stevedore not being the master of a ship has no authority or right to discipline his workmen

by use of physical force. Having no power to use physical force, the law cannot imply that he has delegated to the foreman authority to use force.

The Law cannot from the conventional relation of master and servant raise an implied delegation, by the master to a foreman of authority to commit an unlawful, in fact, criminal act.

Therefore although the maritime jurisdiction over the tort is established, the application of the Jones Act is not shown.

There is no claim that the master aided or abetted the assault, so there is no proof of personal liability. And the court cannot infer as a matter of law that authority to commit an unlawful and criminal act was delegated by the master to the foreman.

CONCLUSION.

The judgment should be reversed and the complaint dismissed.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN, AND MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent,

Answer and Respondent's Brief on Application for Writ of Certiorari.

MIELE & CASTELLANO,
Attorneys for the Respondent,
299 Broadway,
New York City.

WILLIAM S. BUTLER,
JAMES A. GRAY,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

The Clerk will enter my appearance as counsel for the respondent.

JAMES A. GRAY,
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Brooklyn, N. Y.

The Real Questions Involved.

1. Does the maritime law, by reason of the fellow servant rule, exempt an employing stevedore from liability for an assault by a foreman, who, in the scope of his employment and in furtherance of his master's business, assaults a longshoreman subject to his orders?

2. Does the reference by a state Court to a statute of the United States, as showing a legislative tendency, constitute such a construction of the statute as to present a question reviewable in this Court under Writ of Certiorari?

3. Was the petitioner, under the facts of the case and the opinion of the Court of Appeals, denied any right, privilege or immunity claimed or set up, under the laws of the United States?

Supreme Court of the United States

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

Answer to Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Valentin Encarnacion, answering the petition of the above named petitioners for a Writ of Certiorari to be directed to the Supreme Court of the State of New York to review the determination of the Court of Appeals, the highest Court of the State of New York having jurisdiction in the premises, respectfully shows:

Petitioners' Alleged Questions Involved.

"FIRST" AND "SECOND."

None of the questions submitted by petitioner and alleged as involved herein are sustained by the record of the case and the opinion of the Court

of Appeals and question "Third," if sustained, would deprive this Court of jurisdiction to issue the writ.

The determination of the Court of Appeals, as clearly shown by the opinion, was that one engaged in a maritime service and assaulted by a foreman "in directing the performance of the work and intended and believed to be for the interest of the master" should not, on authority of a case decided by the same Court wherein there was a vigorous dissent, twenty-six years before, be deprived of a recovery, at trial term, for the injuries so received, because the foreman committing the assault and the plaintiff were claimed to be fellow-employees.

In reaching this conclusion, stress was laid, by *analogy and analogy* only, upon the "broad field in which Congress has disapproved and changed the (fellow servant) rule introduced into the common law within less than a century" and held "that Congress, doing away with the fellow servant rule in cases of *negligence* coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling."

It is respectfully submitted that the Court of Appeals, in deference to the rule of *stare decisis*, preferred to base its decision upon the changed condition of industry and the trend of legislation regarding industrial employment "to establish (in its own state) a better rule of conduct and give place to a higher degree of justice" rather than to declare its former decision erroneous.

The Real Questions Involved:

1: Does the maritime law, by reason of the fellow servant rule, exempt an employing stevedore from liability for an assault by a foreman, who, in the scope of his employment and in furtherance of his master's business, assaults a longshoreman subject to his orders?

2: Does the reference by a State Court to a statute of the United States, as showing a legislative tendency, constitute such a construction of the statute as to present a question reviewable in this Court under Writ of Certiorari?

3: Was petitioner, under the facts of the case and the opinion of the Court of Appeals, denied any right, privilege or immunity, claimed or set up, under the laws of the United States?

To sustain respondent's contention in this behalf it is only necessary to briefly review the record, thus ascertaining the course of the litigation and the actual determination of the trial Court, the intermediate appeal to the Appellate Division wherein the judgment of the Trial Term was reversed and the final opinion and judgment of the Court of Appeals reversing the judgment of the Appellate Division and affirming the judgment of the Trial Term.

Facts.

Plaintiffs' action was at common law for an assault upon the plaintiff by a foreman or superintendent of an employing stevedore, alleged to have been delegated by defendant to give orders to plaintiff, while both mere engaged in the defendant's service on a barge lying in navigable waters (Plaintiffs' Complaint, fols. 14, et seq.).

The trial Judge allowed a recovery if the jury found the assault was committed in furtherance of

the master's work, was "unprovoked" and were "such as are incident to the performance of the duties entrusted to the foreman" (Charge of Court, fol. 138).

> "The evidence permitted the conclusion that a gang boss or foreman assaulted an employee who was subject to his orders; and the verdict of the jury, under the charge of the learned trial Justice, found the employing stevedore liable for this assault, upon the theory that the same was committed *'in furtherance of the master's work'*" (Op. App. Div., fols. 181, 182).

The only exception, at trial term, was at the end of the whole case and is found at folio 134 as follows:

> "Mr. Hill: I move to dismiss the complaint on the ground that it appears affirmatively that the act complained of was that of a fellow servant acting outside the scope of his employment.
>
> The Court: Denied.
>
> Mr. Hill: Exception."

There were neither exceptions to the statement of the law by the learned trial Justice or requests for additional instructions by counsel for either party (fol. 146).

The learned Appellate Division, solely upon the authority of the case of *Gabrielson* v. *Waydell*, 135 N. Y. 1, held the foreman and employee "fellow servants," reversed the judgment of trial term and dismissed the plaintiffs' complaint.

On appeal to the Court of Appeals the appellant there and the respondent here vigorously attacked the case of *Gabrielson* v. *Waydell* (supra), as being contrary to the weight of authority when

decided and, certainly, not now in consonance with the liberal view of Congress and of both the State and Federal Courts with regard to what has been denominated the "fellow servant rule."

The Court of Appeals thereupon said:

> "Reading Gabrielson v. Waydell (supra), in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiffs' recovery but should hold broadly that Congress in doing away with the fellow servant rule in cases of *negligence* coming within the scope of its legislation, *has left neither substance nor reason to our earlier decision and that it is no longer controlling.* We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (Mott v. Consumers Ice Co., supra.)"

The latter Court reversed the judgment of the Appellate Division and affirmed that of the trial term.

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Supreme Court of the United States

OCTOBER TERM, 1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondent, a longshoreman, in the employ of the defendant, a stevedore, while engaged in loading a barge on the navigable waters of the United States, was assaulted by the foreman to whose orders he was subject.

The assault was found by the jury to have been made within the scope of the foreman's employment and in furtherance of the master's business.

Respondent had judgment in the Trial Court.

The Court of Appeals affirmed such judgment.

The only exception in the record was to the refusal of the Trial Court to dismiss the complaint upon the ground that the foreman and plaintiff were fellow servants.

The sole question considered and decided by the Court of Appeal was whether the employing stevedore was exempted from liability for the assault, by reason of the common employment of the foreman and longshoreman. This question was decided in the negative and the judgment affirmed.

POINT I.

The fellow servant rule, by the weight of authority, has no application in actions for assault and battery.

In 26 Cyc. 1531, supported by a large array of authorities, it is said:

> "In respect to other torts committed by the servant there can be no question but that the master is liable, at the present day, for an assault, false arrest and imprisonment, malicious prosecution, trespass, conversion or a libel, by his servant in the scope of his employment."

The New York rule is well stated in *Mott* v. *Consumers Ice Co.*, 73 N. Y. 543. It is that:

> "For the acts of a servant, within the general scope of his employment, while engaged in his master's business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly or even willfully. * * * But if a servant goes outside his employment and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible." (Quotation from *Girvin* v. *N. Y. C. & H. R. R. Co.*, 166 N. Y. 289).

The same rule is re-asserted in *Magar* v. *Hammond*, 183 N. Y. 387; *Craving* v. *Bloomingdale*, 171 N. Y. 439; and many other cases. *Mott* v. *Consumers Ice* (supra), is given great weight in

the decision now under consideration (see Opinion).

Under the Compensation Law of the State the scope of employment has frequently been before the Court.

A typical case, and on facts somewhat similar to the instant case, is *Knocks* v. *Metal Packing Corporation*, 231 N. Y. 778.

Judge Chase, writing for the Court says:

> "The foreman's duty as such to exercise reasonable discipline over the employees of the factory made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It cannot be said as a matter of law or fact that the foreman who up to the moment of the assault was properly engaged in the performance of his duty to his employer at that moment abandoned his duty and indulged in the assault as an individual act.
>
> The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such, at least until there is sufficient interruption in the performance of such duties as to justify the conclusion that the foreman had abandoned his employment and that the assault was an independent and individual act, as distinguished from acts within the terms of his employment."

See, also, to same effect, *Burke* v. *Towner Brothers*, 203 App. Div. 384; *Distefano* v. *Standard Ship Building Co.*, 203 App. Div. 145; *Fried* v.

Quinlan, 242 N. Y. 496; *Rydeen* v. *Monarch Furniture Co.*, 240 N. Y. 295.

The rule in the Federal Courts seems to be somewhat broader.

Beginning with *Philadelphia and Reading R. R. Co.* v. *Derby*, 14 How. 468, the syllabus reads:

> "A master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the masters orders."

Assault as a tortious act, is not specifically mentioned, but it is included. *Memphis & Newport Packet Co.* v. *Hill*, 122 Fed. 246. *The General Rucker*, 35 Fed. 157; *Ramsden* v. *Boston, etc., R. R. Co.*, 104 Mass. 120; *Craker* v. *Chicago, etc., R. R. Co.*, 36 Wisconsin 675.

This general statement of liability for acts done in the scope of employment is recognized in *Davis* v. *Green*, 260 U. S. 349, in the following excerpt from the opinion of Mr. Justice Holmes:

> "But neither allegation nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. * * * The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey. In other words he did a wilful act wholly outside his employment, while his employment was going on."

In the case at bar both allegations and proof present the assault as done, both in the course of employment and to further the master's business and the Appellate Division, while reversing

the judgment on the ground of fellow employment, unanimously approved the finding of the jury in that regard.

The Court of Appeals, upon the same ground says:

> "We can not, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believe to be for the interest of the master" (fol. 241).

In an earlier part of the opinion and at folios 228, et seq., the Court had said:

> "The Appellate Division reversed, applying the fellow servant rule and holding that there was no liability on the part of the employer even though the foreman inflicted the injuries when he was engaged in hurrying up the work in obedience to the employers orders."

We are now confronted by the query: Does the fellow servant rule apply?

This question has just been answered in a learned and comprehensive opinion by Circuit Judge Swan, concurred in by Circuit Judges Manton and Augustus N. Hand, not yet reported, in *Cain, Plaintiff-Appellee* v. *Alpha S. S. Corporation, William Walker and Frank Daly, copartners doing business under the firm name of Walker & Daly, Defendants-Appellants,* and answered in the negative.

It is not the purpose of Counsel to analyze this opinion or to quote extensively, if at all,

from it, but suffice it to say that a majority of the authorities cited and considered in the opinion of Judge Swan were before the Court of Appeals in the present case and while the two Courts travelled by different paths they converged at the destination.

The Circuit Court of Appeals was not confronted by its own decision to the contrary but was considering the case as one of first impression.

The facts, however, of the two cases are somewhat different.

In the cited case it could readily, upon plaintiff's own testimony, have been said that Cain was punished for a previous dereliction of duty, his tardiness in over-sleeping.

In our case the evidence justifies the inference, that the foreman, in an effort to carry out his orders to keep the men busy, assaulted plaintiff, an employee and subject to his orders, to force him to hurry up with the work in which he was engaged. There is no suggestion of punishment for a previous default but a present assault committed to accelerate the work then being done, which acceleration was carrying out the orders of the master and to further his business and interest.

This would seem to make the instant case much stronger in the fundamental fact of scope of employment. *Davis* v. *Green* (supra).

But be that as it may the cited case is as authoritative on the non-application of the fellow servant rule in the instant case, as the dignity and prestige of the Circuit Court can make it.

If a case must be made under the doctrine of respondent superior as intimated in *Davis* v. *Green* (supra), and decided in *Cain* v. *Alpha S. S. Corporation, et al.* (supra) our case is made out beyond peradventure.

Nor are we deprived of our recovery by reason of the fellow servant rule.

The research of the Circuit Court of Appeals in the Cain case revealed but two cases in which the rule had been discussed as to its applicability to a wilful assault, one of which was *Memphis & Newport Packet Co.* v. *Hill,* 122 Fed. 246 (CCA 8), already referred to and *Gabrielson* v. *Waydell,* 135 N. Y. 1.

The former case rejected the rule and the latter is overruled by the decision which it is sought to bring before this Court by the petition herein.

It is conceded that it was overruled chiefly by reference to congressional legislation, but it is submitted and confidently urged that such reference was by analogy only and the Circuit Court says, and it is true, that "the statutes may appropriately be referred to as showing the legislative tendency." Besides, if the conclusion is right the reasoning by which it was reached is not a ground of error.

While maritime authority is lacking upon the applicability of the rule in cases of assault by servants of the same grade, there are cases both at common law and in admiralty where both Federal and State Courts have refused to apply the rule where the act was committed by one having authority over the other.

In the dissenting opinion in *Gabrielson* v. *Waydell* (supra), Judge Maynard quoted with approval, *Wood on Master and Servant,* Sec. 864, as follows:

> "If he (the master) places a servant in a position of authority over other servants, and makes the inferior servant subject to the direction and control of the superior, while he is not chargeable for the consequences of directions given by such superior

> servant within the scope of the general employment, yet there is no reason why he should not be chargeable to a co-servant for an abuse of such authority as much as he would be to a stranger."

In a case between the same parties, *Gabrielson* v. *Waydell,* brought in the Federal Court after a discontinuance in the State Court succeeding the reversal and direction of a new trial by the Court of Appeals, the Federal Court, 67 Fed. 342-345, said:

> "Actions upon the liability of principals for the acts done by agents placed over others are of comparatively modern origin, although the principles underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as others."

In *Cain* v. *Alpha S. S. Co., et al.* (supra), Judge Mack at trial term said:

> "The liability of the defendant in this case is based upon the ship owner's responsibility for the acts of the second engineer in relation to a seaman's acts done, in the jury's opinion, in the course of his duty as the superior of the seaman, and thus representing the owner and not in his personal capacity out of personal spite or malice. * * * In my opinion the fellow servant rule has no application."

In *Memphis & Newport Packet Co.* v. *Hill,* 122 Fed. 246 heretofore referred to, the syllabus is:

> "A deckhand on a steamer who has been selected by an officer in command to act as

> captain of the watch and to exercise authority and control over other deckhands, is, for the time being, an officer of the vessel and the owner cannot avoid liability for an assault committed by him upon another deckhand while so acting, on the ground that the two were fellow servants."

In *Kennedy* v. *Cunard S. S. Co., Ltd.*, 197 App. Div. 459, 467, aff. 235 N. Y. 604, it was held:

> "The foreman in this case directed the work in the three hatches; the men took their orders from him and applied to him for tackle and other appliances used in their work; it was he who gave the order to close the hatches. He was not a fellow servant but was the *alter ego* of the master."

In the "Sinaloa" 292 Fed. 640 where sailors upon a foreign vessel being operated by American citizens were subjected to abuse and one assaulted by the mate by the captain's orders and he and another were ordered from the ship, wages were held recoverable and the assaulted seaman was held entitled to recover for the assault.

In a somewhat similar situation in *The Rolph*, 293 Fed. 269, aff. 299 Fed. 52, sailors who were assaulted by a brutal mate were allowed to proceed in rem against the vessel, notwithstanding Admiralty Rule 16 and were awarded indemnity for their injuries.

In neither of these cases could indemnity have been recovered had the fellow servant rule applied in actions for assault.

In non-maritime cases in the State Courts, no case has been found where the fellow servant rule has been applied although several specifically repudiate it.

In *Richard* v. *Amoskeag Mfg. Co.,* 109 Atlantic 88, the Supreme Court of New Hampshire sustained a judgment against an employer obtained by an employee for an assault by his immediate superior.

The Court said:

> "The same principle is applicable when the assaulted party is a co-employee and not what is termed a third party."

In *Flemming* v. *Tarboro Knitting Mills,* 161 N. C. 436, the master was held liable for an assault by the foreman upon an employee working under him.

Lamb v. *Littman,* 128 N. C. 361, sustained a judgment wherein the injury was caused by the violent handling of the plaintiff by defendant's alter ego, in urging him to the proper performance of his work.

Alabama has given effect to the same principle in *Avondale Mills* v. *Bryant,* 10 Ala. App. 514 and *Jabeles Colias Conf. Co.* v. *Booze,* 181 Ala. 459, as has the Dominion of Canada in *Hudson Bay Co.* v. *Vaillancourt,* 2 Dom. L. R. N. S. 1008.

The Supreme Court of Mississippi has seemingly strained the scope of employment by extending the rule to a foreman who assaulted an employer in an attempt to prevent a strike. *Aldin Mills* v. *Pendergraft,* 115 So. Rep. 713.

Other cases bearing upon the principle have been noted and commented upon by Judge Swan in the *Cain* case. The foregoing, however, are sufficient to show the general trend of the Courts and to sustain the assertion of Judge Mack in the trial Court in the last named case that the decision of the Appellate Division in the instant case is contrary to the weight of authority.

Furthermore the very essence of the fellow servant rule is the assumption of risk the employee

takes that those with whom he is called upon to work may become careless in the performance of work causing injury to his fellow and such risk is reflected in the compensation he receives for his work.

This is not true with the extraordinary risk of being assaulted or mistreated by one placed in authority over him. His contract of employment, from its very nature, implies a covenant of decent and humane treatment and public policy requires its fulfillment. The days of physical violence, as a means to hurry up work, passed in this country with the institution of slavery and nothing has since occurred in the moral or civil code to revive it.

The determination of the Court of Appeals that the trial Judge committed no error in denying the defendant's motion to dismiss the complaint upon the ground that plaintiff and his foreman were fellow servants was correct.

POINT II.

Reference to the trend of legislation culminating in the enactment, by Congress, of a certain statute, is not a construction of the statute justifying review by Writ of Certiorari.

It is matter of common knowledge that the Employers' Liability Act (35 Stat. ch. 149, sec. 1) abrogated the fellow servant rule, restricted the defense of contributory negligence and assumption of risk and extended liability to cases of death. *Minn. &c. R. R. Co.* v. *Rock*, 299 U. S. 410.

This was accomplished by creating liability for "injury or death resulting in whole or in part

from the negligence of any of the officers, agents or employees of such carrier," thus placing the negligence of a co-employee upon the same basis as that of the employer.

The Merchant Marine Act (3 Masons U. S. Code Tit. 46, Chap. 18, Sec. 668, p. 3273) extended to seamen who shall suffer injury in the course of their employment the rights and remedies given by Congress to railroad employees.

This Court in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 365, held that "its origin, environment and subject matter show that it is intended to and does bring the rules to which it refers into the maritime law."

In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, the Act was held to include longshoreman within its provisions.

Thus, as stated by Mr. Justice Holmes in the last named case "has Congress disapproved and changed the (fellow servant) rule introduced into the common law within less than a century."

Congress, in the successive Acts relating to such rule and the Courts in construing them have treated the rule as applicable only in personal injury to an employee resulting from negligence.

Is it not, therefore, a plausible inference that it never, even at common law, extended beyond injury from negligence and therefore never included, in its application, injury by assault by one employee upon another?

Particularly persuasive of this conclusion is the manner of its abrogation above referred to, to-wit, creating a liability for injury or death where none had before existed "resulting in whole or in part from the negligence of any * * * employees * * *."

It was this trend of legislation to which the Court of Appeals referred and upon which it held that the authority of its former decision "as a rule of maritime law has been largely, if not fully, spent."

What better authority could be asked or found for declaring that there is left "neither substance nor reason to our earlier decision and that it is no longer controlling?"

The effort of petitioner to ascribe to the Court of Appeals a construction of the Employers Liability Act or the Merchant Marine Act imposing liability under both or either for the assault in this case is abortive.

It only held that a previous determination by the same Court was erroneous and refused to exempt, under its authority the defendant from liability because of an alleged rule, "which in its restricted scope has not escaped criticism and has by statute frequently been curtailed or abolished. *"Alpha S. S. Corp., et al.* v. *Cain* (supra)." Only this and nothing more.

No where in the opinion by specific statement or clear intimation, is it held that the Employer's Liability Act applies to assault.

The record of the trial Court resulting in the judgment affirmed contained but one exception, that of denial of defendant's motion to dismiss the complaint upon the ground that the plaintiff and foreman were fellow servants, and the Court of Appeals was powerless to decide anything else and did not do so.

Such decision does not present a substantial or, in fact any construction of the Employer's Liability Act in relation to exemption of the defendant from liability thereby.

POINT III.

The petitioner, under the facts of the case and the determination of the Court of Appeals, was not denied any right, privilege or immunity claimed or set up under the laws of the United States.

Certainly there is no statute of the United States which exempts the defendant from liability because the foreman and the assaulted party were in the same employ.

The action is in personam and no restriction other than that it shall be so brought is contained in any rule of the Courts of the United States.

His right, privilege and immunity, then, if any exists, must be found in his exemption, under the maritime law, by virtue of the application of the fellow servant rule.

That no such exemption exists is, we think, thoroughly established by the admittedly incomplete and rambling memorandum above.

Petitioners' Third Alleged Question.

If this Court has jurisdiction to grant the Writ of Certiorari herein it is because a substantial Federal question is involved. Such question does not arise unless the tort was in every sense maritime. If any of the elements of a maritime tort, the contract, the work or the locality is lacking, then the matter is of local concern, the Court is without jurisdiction and the petition must be dismissed.

Conclusion.

If the Court entertains the petition the Writ should be denied.

1st. Because the determination of the Court of Appeals contravenes no principle of maritime law.

2nd. Because there was no construction of any statute of the United States.

3rd. Because the defendant was not denied any right, privilege or immunity claimed or set up under the laws of the United States.

Respectfully submitted,

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